RECENT DECISIONS.

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ARREST—ACTIONS UPON CONTRACT—FRAUD IN CONTRACTING OR INCURRING THE LIABILITY.—In an action to recover liquidated damages on an executory contract which the plaintiff alleged that she was induced to enter by defendant's fraudulent representations, *held,* two judges dissenting, the defendant might be arrested under N. Y. Code of Civ. Proc. § 549, subd. 4, providing for that relief "in an action upon contract express or implied . . . where it is alleged in the complaint that the defendant was guilty of a fraud in contracting or incurring the liability", although the plaintiff by so suing ratified the contract. *Novotny* v. *Kosloff* (N. Y. App. Div. 1913) 50 N. Y. L. J., Dec. 13, 1913.

Section 549 deals with cases in which the right to arrest depends upon the nature of the action; nevertheless, although the allegation of fraud is material and the character of the statutory action differs in a sense from that known to the common law, see *Merriam* v. *Johnson* (N. Y. 1906) 116 App. Div. 336, the suit is still one upon the contract. See *Frey* v. *Torrey* (N. Y. 1902) 70 App. Div. 166, affirmed (1903) 175 N. Y. 501. Although a statute of this kind, as providing a remedy of penal character, *Hathaway* v. *Johnson* (1873) 55 N. Y. 93, is to be strictly construed, see Black, Interpretation of Laws, 298, the distinction contended for in the dissenting opinion between fraud in the inception and fraud in the breach of a contract, would, if adopted, make deceit the gist of the action, see *Caldbeck* v. *Simanton* (1909) 82 Vt. 69, and so render § 549 subd. 4 useless, as referring only to cases already covered by § 549 subd. 2. It is obvious, however, that a plaintiff who has acted upon the fraudulent representations of the defendant and suffered a detriment by extending credit or parting with the possession of property, may properly sue for damages upon the executed contract and avail himself of the order of arrest. Inasmuch as no distinction between executed and executory contracts seems to have been contemplated by the statute, and the right to arrest is not barred by the fact that no damages for the fraud are sought, see *Hoboken Beef Co.* v. *Loeffel* (N. Y. 1889) 23 Abb. N. Cas. 93, it follows that where, as in the principal case, the action is one for damages under a purely executory contract, it falls within the purview of the statute and arrest is, therefore, authorized.

BANKRUPTCY—EXAMINATION OF BANKRUPT—VALIDITY OF EXAMINATION BEFORE ADJUDICATION.—A bankrupt was convicted of perjury for statements made by him in an examination under § 21a of the Bankruptcy Act. On *certiorari* to the Supreme Court, he objected that since the examination was made prior to the adjudication his estate was not "in process of administration." *Held,* objection overruled, because the filing of the petition in bankruptcy places the estate of the alleged bankrupt *in custodia legis,* and expediency requires a prompt examination before the bankrupt has time to conceal his estate. *Cameron* v. *United States* (Supreme Court, Oct. Term, 1913). Not yet reported.

This conclusion was reached on the same grounds in a criticism of the contrary case of *Skubinsky* v. *Bodex* (C. C. A. 1909) 172 Fed. 332, in 10 Columbia Law Rev. 70.

BANKRUPTCY—LIEN OF TRUSTEE—DATE OF VESTING.—A contract of conditional sale was recorded one day after the filing of a petition in bankruptcy. *Quaere,* whether the lien given a trustee by Act of June 25, 1910, c. 412, amending Section 47 a (2) of the Bankruptcy Act of 1898, attaches as of the time of the institution of the bankruptcy proceedings or the time of the adjudication. *In re Rose* (D. C. N. D. Ga. 1913) 206 Fed. 991.

As an extension of the general policy of the Bankruptcy Act of 1898 and as a protection to the trustee against unrecorded liens, see *In re Bazemore* (D. C. 1911) 26 Am. B. R. 494, the Amendment of 1910 invested him with the rights of a judgment creditor. See 24 Harvard Law Rev. 620; 13 Columbia Law Rev. 158. His title, though vesting as of the date of the adjudication, extends to all property which the bankrupt could have transferred before the filing of the petition. Act of 1898, § 70 a. It is from the date of the petition, moreover, that the estate, for safe keeping, is placed in *custodia legis,* see *Everett* v. *Judson* (1913) 228 U. S. 474; *Acme Harvester Co.* v. *Beekman Lumber Co.* (1911) 222 U. S. 300, notwithstanding a subsequent failure to obtain adjudication, see *Cameron* v. *United States* (Supreme Court, October Term 1913, not yet reported), and it is as of the date of the petition that all rights to and claims against the estate are to be adjusted. See *In re Williamsburg Knitting Mill* (D. C. 1911) 190 Fed. 871. Furthermore, the rule that the filing of the petition operates as a *caveat* to all the world, see *Mueller* v. *Nugent* (1902) 184 U. S. 1, 14, both tends to secure the earliest possible relief, see *Bank* v. *Sherman* (1879) 101 U. S. 403, and observes the precise spirit of the Amendment of 1910. See 3 Remington, Bankruptcy, 331 *et seq.* Unless, therefore, the case is one for which the right to go back four months from the filing of the petition is specifically provided, see *In re Farmers etc. Co.* (D. C. 1913) 30 Am. B. R. 187, it follows, not only as an irresistible result of the settled policy and construction of our federal bankruptcy legislation, but as an effective imposition of court control upon the bankrupt estate with a view to its equitable distribution, that the lien of the trustee should attach as of the date of the institution of the proceedings.

BANKRUPTCY—PRIOR DISCHARGE—SECTION 14B.—Within six years of his last discharge in voluntary bankruptcy, the petitioner filed an application for another discharge, which was passed upon more than six years following the former discharge. *Held,* under § 14b, application dismissed. *In re Dunphy* (D. C. Me. 1913) 206 Fed. 680.

In construing § 14b of the Bankruptcy Act, it has been uniformly held that the six year period after the first discharge must expire before the time of hearing on the application for a second discharge and not before the date of filing the petition in bankruptcy, *In re Little* (C. C. A. 1905) 137 Fed. 521, and it need not, according to many *dicta,* which appear to be sound, have passed before the date of the application for a second discharge. See *In re Jordan* (D. C. 1905) 142 Fed. 292; *In re Haase* (D. C. 1907) 155 Fed. 553; 2 Loveland, Bankruptcy (4th ed.) 1327; Collier, Bankruptcy (9th ed.) 359;

Brandenberg, Bankruptcy (3rd ed.) § 371; 2 Remington, Bankruptcy § 2577. The purpose of § 14b was to deprive the bankrupt for a specified period of the personal privilege of relief from liability on his adjudicated debts. It, therefore, does not affect the former creditors, who are interested only in the assets at the time of the filing of the second petition in bankruptcy, *In re Burka* (D. C. 1900) 104 Fed. 326, but rather prevents possible future creditors from trusting a perpetual bankrupt. See *In re Seaholm* (C. C. A. 1905) 136 Fed. 144. If, then, the bankrupt has complied with all the conditions at the date of the hearing, there is no valid objection to his discharge, since there has been no fraud practised on anyone. Therefore, as there seems to be no reason to apply the technical doctrine of the courts that facts are adjudged as of the date of filing the petition, see 3 Remington, Bankruptcy 757, the explicit wording of the statute should not be given a forced construction. See *In re Jordan, supra,* and the principal case, which is the only square holding on the exact state of facts, would seem unsound.

BANKRUPTCY—RECISSION BY DEFRAUDED VENDOR—RIGHTS AGAINST TRUSTEE.—A defrauded vendor of chattels sought to reclaim the property from the vendee's trustee in bankruptcy. *Held,* he could recover, because the trustee had no better title than a judgment or attaching creditor, whereas only *bona fide* purchasers can prevail against a defrauded vendor. *Matter of Gold* (C. C. A. 1913.) Not yet reported.

This conclusion was reached on the same grounds in a criticism of the contrary case of *In re Whatley Bros.* (D. C. 1912) 199 Fed. 326, in 13 Columbia Law Rev. 158.

COMPROMISE AND SETTLEMENT—DOUBTFUL CLAIM AS CONSIDERATION.—An insurance company which had assumed the policies of several defunct companies, compromised a doubtful claim of $5000, which was urged in good faith, with a note for $2750. On motion for nonsuit, *held,* there was evidence to go to the jury, since the claim had sufficient foundation to be the basis of a valid compromise. *Roane* v. *Union Pacific Life Ins. Co.* (Ore. 1913) 135 Pac. 892.

As consideration for a promise consists of the surrender of any legal right, on strict theory a claim need not be sustainable at law or in equity, in order to make forbearance from a suit thereon consideration for a compromise, and the determining factor is the policy of the court as to what claims can be legally a basis for suit. All jurisdictions require that the claim be urged in good faith, for no one has a right to use the tribunals for the prosecution of claims which he knows to be legally unsustainable. See *Eysaman* v. *Nelson* (1912) 140 N. Y. Supp. 183, at 206-7. But few courts agree as to what claims one can urge even if acting *bona fide.* The most latitude is allowed in those jurisdictions where anyone has a "legal right" to a determination of any question, no matter how ill-advised or unreasonable he may be. *Cook* v. *Wright* (1861) 1 Best & S. 559; *Ripy Bros. Distilling Co.* v. *Lillard* (1912) 149 Ky. 726. There is no doubt of the theoretical correctness of this view. Most courts, however, influenced by practical considerations, hold that the surrender of a doubtful claim will support the promise only where the court conceives reasonable men could disagree. *U. S. Mortgage Co.* v. *Henderson* (1886) 111 Ind. 24, 36. The principal case, although sound, therefore, represents the conservative tendency.

CONFLICT OF LAWS—COMITY—FOREIGN JUDGMENT OBTAINED WITHOUT PERSONAL SERVICE.—A judgment, based on service by publication, was obtained in a foreign country against a subject, whose domicile was in New York and who had filed notice of his intention to become an American citizen. *Held,* the judgment was not enforcible in New York. *Grubel* v. *Nassauer* (N. Y. Ct. of Appeals, 1913). Not yet reported.

A personal judgment rendered without jurisdiction of the parties is internationally invalid, 2 Wharton, Conflict of Laws (3rd ed.) § 649; *Buchanan* v. *Rucker* (1808) 9 East R. 192, and, as between sister States is not entitled to full faith and credit. *Pennoyer* v. *Neff* (1877) 95 U. S. 714; *cf. Connecticut Trust Co.* v. *Wead* (1902) 172 N. Y. 497, 503. Practical considerations, however, have led to statutes providing for the acquisition of jurisdiction without personal service, see 11 Columbia Law Rev. 352, but the application of these statutes is limited to those who owe obedience to the court's decree by virtue of domicile or citizenship. See *Huntley* v. *Baker* (N. Y. 1884) 33 Hun 578; *Douglas* v. *Forrest* (1828) 4 Bing. 686; but see *Raher* v. *Raher* (1911) 150 Ia. 511. If the mere fact that the parties are subjects or citizens of the country is sufficient to give a court jurisdiction over them, 26 Harvard Law Rev. 296; see *Rousillon* v. *Rousillon* (1880) L. R. 14 Ch. Div. 351; *Cowan* v. *Braidwood* (1840) 10 L. J. Rep. [N. S.] C. P. 42; *contra, Smith* v. *Grady* (1887) 68 Wis. 215, then, it is clear, that the judgment was not internationally invalid in the sense that, as a matter of course, it must be denied enforcement. But the European conception of jurisdiction based on allegiance, 26 Harvard Law Rev. 193, has not found much favor in the United States, partly because of its inutility as a test in the case of foreign judgments by sister States under our federal system of government, in which state citizenship depends on domicile, and partly because of the less important place of allegiance in our institutions. See 13 Columbia Law Rev. 744. The injustice of the allegiance test, moreover, 1 Wharton, Conflict of Laws (3rd ed.) 34, which in this case would operate to enforce a judgment against a non-resident defendant who had practically renounced his citizenship, fortifies the conclusion that the principal case is sound in its refusal to feel itself bound by comity to enforce the foreign judgment.

CONFLICT OF LAWS—COMITY—PENAL CHARACTER OF FOREIGN STATUTE.—For a wrongful death in Massachusetts, suit was brought in Connecticut under the Massachusetts statute, which provides for the assessment of damages according to the degree of the defendant's culpable negligence. *Held,* because the Massachusetts courts regard the statute as penal, Connecticut courts cannot enforce it. *Christilly* v. *Warner* (Conn. 1913) 88 Atl. 711.

Although the highest authorities have agreed that actions, to be penal in an international sense, must be in favor of the state and in vindication of public rights, *Huntington* v. *Attrill* (1892) 8 Times Law Rep. 341; *Huntington* v. *Attrill* (1892) 146 U. S. 657, the somewhat arbitrary standard set up by these decisions has not proved convincing to many state courts, which still look to the damages and determine whether or not these necessarily afford more than mere compensation. *Raisor* v. *C. & A. R. R.* (1905) 215 Ill. 47, 55; *Rochester* v. *Wells-Fargo Co.* (1912) 87 Kan. 164. This view is sup-

ported by the deeper reason that the true test must look to the nature of the remedy in its relation to the whole scheme of damages; thus the non-compensatory and actively punitive character of the damages awarded under the Massachusetts statute is so clear as to render the enforcing agency, whether citizen or State, of minor interest, and overthrow the contention made in *Huntington* v. *Attrill* (1892) 146 U. S. 657, 676, that in a private action the punitive element, if existent at all, affects no one except the defendant. Of course, if the statute is penal it can have no extraterritorial force, *The Antelope* (1825) 10 Wheat. 66, 123, even on principles of comity, *Dougherty* v. *American McKenna Co.* (1912) 255 Ill. 369, and the determination of its character rests with the tribunal, which is guided by the decisions of the courts of the enacting State, but bound by no precedents save its own. *Higgins* v. *Central N. E. R. R.* (1892) 155 Mass. 176, 180; *Huntington* v. *Attrill* (1892) 8 Times Law Rep. 341, 342. The Connecticut court, therefore, in considering itself bound by the Massachusetts decisions, runs the risk of being compelled in future to enforce a law which a sister State may consider remedial, but which is in fact penal. No principle of comity requires or justifies such a result.

CONSTITUTIONAL LAW—GAME LAW PROHIBITING ALIENS FROM CARRYING SHOTGUNS.—The defendant, an Italian, violated a statute prohibiting any "unnaturalized foreign-born resident from having a shot-gun or rifle in his possession." *Held,* the statute was not invalid under the Fourteenth Amendment, nor did it contravene a treaty guaranteeing equal security and privileges to aliens. *Patsons* v. *Pennsylvania* (Supreme Court, October Term 1913). Not yet reported.

In holding this to be a reasonable classification for the legitimate purposes of the statute, rather than a discrimination against foreigners, the principal case is in line with the general trend of authority. See 12 Columbia Law Rev. 729.

CONSTITUTIONAL LAW—LIMITED LIABILITY ACT—EXEMPTION OF SOVEREIGN.—The United States brought an action for the value of mail lost in the sinking of the defendant's ship. *Held,* the United States was bound by the statute limiting the shipowner's liability to the value of the ship and cargo. *United States* v. *Hamburg-Amerikanische Gesellschaft* (C. C. A. 1914) N. Y. L. J., Feb. 2, 1914.

In general, statutes for the limitation of actions do not bind the sovereign. *United States* v. *Thompson* (1878) 98 U. S. 486; *People* v. *Van Rensselaer* (N. Y. 1850) 8 Barb. 189. This exemption rests not on any prerogative of sovereignty, *United States* v. *Knight* (1840) 14 Pet. 301, 315, so much as on either the fanciful presumption that the king is too busy caring for the public good to have time to assert his rights, 1 Bl., Comm.* 247, or the sound public policy which demands that public rights should not be exposed to loss through the negligence of public officers in failing to bring actions in time. *United States* v. *Hoar* (C. C. 1821) 2 Mason 311. In either case, the reason applies only to statutes limiting the time in which actions may be brought, as is indicated by the maxim *"Nullum tempus occurrit regi",* and not to statutes limiting liability. As a matter of interpretation, it may be presumed that the legislature never intends to bind the sovereign unless he is expressly named, *People* v. *Gilbert* (N. Y. 1820) 18 Johns. 227; *United States* v. *Nashville Ry.* (1885) 118 U. S. 120, but this presumption fails in the case of statutes for the

general advancement of learning, morality, or the public good. See *United States* v. *Herron* (1873) 20 Wall. 251, 255. Despite the fact that the present statute is much like the Bankruptcy Act, which has been held not to bind the sovereign, *United States* v. *Herron, supra,* it is declared to be a statute *pro bono publico,* entitled to a liberal interpretation; *Providence etc. Co.* v. *Hill Mfg. Co.* (1883) 109 U. S. 578, 589; it would seem, therefore, not to be within the general rule. The Supreme Court has not yet passed on this phase of the statute, but the English courts seem to be inclined to adopt this view of the similar English act. See *The Zoe* (1886) L. R. 11 P. D. 72.

CONSTITUTIONAL LAW—RIVER BOUNDARIES—CONCURRENT CRIMINAL JURISDICTION.—The defendant was guilty of gaming upon a boundary river under concurrent state jurisdictions but beyond the line of the opposite Arkansas county. Upon the trial, he denied the jurisdiction of the Arkansas court under its constitutional provision insuring him a trial by a jury of the county in which the crime was committed. *Held,* his conviction by the court of the adjacent county was lawful. *Brown* v. *State* (Ark. 1913) 159 S. W. 1132. See Notes, p. 249.

CONTRACTS—ORAL MODIFICATION OF WRITTEN CONTRACT—STATUTE OF FRAUDS.—The defendant, in writing, authorized the plaintiff to sell property for $90,000, promising to pay a commission. By a later oral agreement the selling price was changed to $75,000, whereupon the plaintiff sold the property and now sues for his commission. *Semble,* the plaintiff could recover, showing the oral agreement as a modification of the original contract. *Slotboom* v. *Simpson Lumber Co.* (Ore. 1913) 135 Pac. 889.

When a contract in writing pursuant to the requirements of the Statute of Frauds is modified by a later oral agreement, it seems clear that both the oral agreement, and the contract which is composed of a combination of the written and oral agreements, are void under the Statute of Frauds. See 4 Columbia Law Rev. 462, 463, n. 1. When the oral contract merely varies the mode of performance, such as the time for delivery, and has been acted upon, some courts hold that the new agreement is valid, as substituting one manner of performance for another, since the Statute of Frauds does not concern itself with performance; *Cuff* v. *Penn* (1813) 1 Maule & Sel. 21; *Cummings* v. *Arnold* (Mass. 1842) 3 Met. 486; *contra, Stead* v. *Dawber* (1839) 10 A. & E. 57; it seems preferable, however, to admit the oral contract only so far as it waives the manner of performance fixed in the original contract, *N. K. & T. Ry.* v. *Pratt* (1902) 64 Kan. 118; *Neppach* v. *Oregon, etc. Ry.* (1905) 46 Ore. 374; *Smiley* v. *Barker* (1897) 83 Fed. 684, or as it estops the party allowing the extension of time from insisting upon the original terms. *Scheerschmidt* v. *Smith* (1898) 74 Minn. 224; see *Longfellow* v. *Moore* (1882) 102 Ill. 289; *contra, Clark* v. *Guest* (1896) 54 Oh. St. 298. Such parol waiver is perfectly valid under the Statute of Frauds, nor does it violate the parol evidence rule, since it does not vary the contract but simply places the defendant in a position where he cannot insist upon strict compliance with its terms. When, however, the new contract does not attempt merely to alter the mode of performance, but, as in the principal case, seeks to change the agreement itself, it is obviously unsound to treat it as a waiver, which can be predicated only of conditions. *Hill* v. *Blake* (1887) 97 N. Y. 216.

CORPORATIONS—CRIMINAL LIABILITY—LARCENY.—*Held,* a corporation may be convicted of larceny. *People* v. *Tyson & Co.* (N. Y. City Mag. Ct. 1914) N. Y. L. J., Jan. 13, 1914. See Notes, p. 241.

CORPORATIONS—EXTRAORDINARY DIVIDENDS—CAPITAL OR INCOME.—Stock was bequeathed to trustees to pay the income to persons named during their lives, with remainder over. The trustees account and ask whether certain dividends are income or capital. *Held,* extraordinary dividends from surplus accumulating before the death of the testator are principal, while those earned afterward are income. *Matter of Cooper* (N. Y. 1913) 82 Misc. 324; *Matter of Osborne* (1913) 209 N. Y. 450.

In adjudicating the rights of life tenants and remaindermen to extraordinary dividends declared upon stock which is the subject of a trust for their benefit, many courts have adopted the simple but arbitrary test that all cash dividends are income, while those paid in stock are capital; other jurisdictions take the view that so much of the dividend as represents surplus earned before the creation of the trust must have been intended by the testator to be a part of the *res.* 11 Columbia Law Rev. 556. The New York courts, however, although assigning any distribution of the corporation's capital to the *corpus* of the estate, see *Matter of Rogers* (N. Y. 1897) 22 App. Div. 428, 433, for a long time determined the claims to the corporation's surplus as of the time when the dividend was declared. *Lowry* v. *Farmers' Loan & Trust Co.* (N. Y. 1900) 56 App. Div. 408, affirmed (1902) 172 N. Y. 137; *Robertson* v. *De Brulatour* (1907) 188 N. Y. 301. On strict theory this view is supported by the principle that the stockholder is in no way entitled to the corporation's surplus until the corporation sees fit to distribute it. *Lowry* v. *Farmers' Loan & Trust Co., supra.* The case of *Matter of Harteau* (1912) 204 N. Y. 292, however, adopted as the test the time when the surplus was earned, thus, in effect, adopting the Pennsylvania rule. See 11 Columbia Law Rev. 556. The surrogate in the first principal case, following this decision rather than that of the other principle case in the court below, *Matter of Osborne* (N. Y. 1912) 153 App. Div. 312, arrives at the same conclusion as the latest case in the Court of Appeals which, it is to be hoped, settles the law in New York.

DAMAGES—INNOCENT TRESPASS—UNAUTHORIZED MINING OF COAL.—A surface tenant innocently mined coal on the defendant's land without authority. *Held,* the measure of damages was the value of the coal in place. *The Trustees of Kingston* v. *Lehigh Valley Coal Co.* (Pa. 1913) 88 Atl. 768.

For a discussion of the principles involved, see 9 Columbia Law Rev. 555.

DAMAGES—REMITTITUR—ADMISSION OF EXCESSIVE VERDICT.—Judgment was entered upon a verdict for personal injuries after one-half had been voluntarily remitted. The defendant appealed on the ground that the *remittitur* was an admission that the verdict was excessive and the product of prejudice on the part of the jury. *Held,* the discretion of the trial court had not been abused. *Gila Valley, Globe & Northern Ry.* v. *Hall* (U. S. Sup. Ct. 1913). Not yet reported.

It is now generally recognized that within the sound discretion

of the court a *remittitur* of damages may be allowed to cure a defect in the verdict of the jury manifested in an excess ascertainable by a mere computation, see *Rogers* v. *Bowerman* (C. C. 1884) 21 Fed. 284, and by the weight of authority this is possible although the damages were unliquidated. See 6 Columbia Law Rev. 125. Where the verdict is so excessive, however, as to indicate that it was the result of an impassioned or prejudiced jury the sound view would seem to be that it was vitiated *in toto*. See 5 Columbia Law Rev. 166. There seems to be no ground of distinction in this regard between a *remittitur* suggested by the court and one offered by the plaintiff in the first instance. *Southern Pac. Co.* v. *Tomlinson* (1893) 4 Ariz. 126; but see *McCoy* v. *Treichler* (1894) 90 Ia. 1. The latter is not inconsistent with the fact that the verdict was proper, for it might imply a desire for peace rather than a concession of error, *cf.* 2 Wigmore, Evidence, § 1061, and therefore would be no more an admission than an offer of compromise before a verdict, *cf.* 13 Columbia Law Rev. 749; *Augusta Ry.* v. *Glover* (1893) 92 Ga. 132, especially where authorized by statute. *Cf.* Ariz., Rev. Stat. (1901) § 1450. Even if considered in the nature of an admission, in the jurisdiction of the principal case the excess must indicate passion or prejudice in order to inhibit a *remittitur*, see *Southern Pac. Co.* v. *Fitchett* (1905) 9 Ariz. 128, and the same discretion would be involved in determining the amount necessary to be remitted to show this as in those cases where the *remittitur* was at the instance of the court; the voluntary action of the plaintiff, therefore, would not be conclusive against him. *Cf. Savannah, F. & W. Ry.* v. *Godkin* (1898) 104 Ga. 655.

EQUITY — ELECTIONS — PROTECTION OF POLITICAL RIGHTS.— Plaintiff charged that the Democratic Central Committee, constituted by law for the trial of contests in the primary elections, had fraudulently certified the name of his competitor to the Secretary of State as the Democratic nominee for governor. *Held,* an injunction to restrain the Secretary of State from certifying the contestee's name to the various county election commissioners would not issue, since no property rights were involved. *Walls* v. *Brundidge* (Ark. 1913) 160 S. W. 230. See Notes, p. 243.

EVIDENCE—FELONIOUS INTENT—FAILURE TO SUE.—The defendant, in a prosecution for larceny, claimed that he believed when he took the property that it belonged to his father. Evidence that he had never attempted to sue to recover the property from the prosecuting witness, *held,* one judge dissenting, inadmissible. *Harris* v. *State* (Tex. 1913) 160 S. W. 447.

The inherent difficulty of establishing the existence of a mental state requires that the rules of strict relevancy be modified, *Moore* v. *State* (1853) 2 Oh. St. 500, to admit proof of collateral circumstances from which its existence may be logically inferred, see *Commonwealth* v. *Abbott* (1881) 130 Mass. 472, but where an act of one's opponent is sought to be introduced in evidence as inconsistent with his claim it must bear unequivocally upon the good faith of the actor or fairly tend to establish some probative or *res gestae* fact. 2 Chamberlayne, Evidence, § 1396. The inference here sought to be drawn from the defendant's failure to sue, that he did not in good faith lay claim to the property, is a negative one and must be tested by the further inference that if the defendant had so claimed it he

would have instituted an action. See *Thomas* v. *Degraffenreid* (1850) 17 Ala. 602; *Chambers* v. *Hill* (1876) 34 Mich. 523. But this inference is by no means clear, since the defendant might from the start have considered that he was entitled to take the property and that an action would therefore be unnecessary. But even though logically relevant, evidence may be rejected where its probative force is too slight to warrant the expenditure of the time necessary for proving, testing and weighing it, 1 Jones, Evidence (Horwitz ed.) 665, and this applies particularly where the inferences to be drawn from the testimony are negative, since these involve a greater element of speculation than do positive inferences.

EVIDENCE—MOTION FOR A NEW TRIAL—ADMISSIBILITY OF JURORS' AFFIDAVITS TO SHOW THEIR MISCONDUCT.—Appellant in his motion for a new trial introduced affidavits of three jurors to show that the amount of the verdict was arrived at by tossing a coin. *Held,* the testimony of jurors is inadmissible in support of a motion to set aside a verdict on the ground of misconduct of the jury. *Goldenberg* v. *Law* (N. Mex. 1913) 131 Pac. 499.

Appellant introduced evidence of jurors in a criminal case to show that they had read newspaper reports of the trial. *Held,* the evidence was not competent, as a juror cannot be examined to establish a ground for a new trial except where the verdict was determined by chance. *Capps* v. *State* (Ark. 1913) 159 S. W. 193.

Plaintiff's motion for a new trial was supported only by hearsay evidence that a juror had visited the place of the accident without the court's permission. *Held,* a juror's affidavit is competent to establish the fact though not the effect of misconduct, but the evidence introduced, being mere hearsay, was insufficient to prove the fact. *Maryland Casualty Co.* v. *Seattle Electric Co.* (Wash. 1913) 134 Pac. 1097. See Notes, p. 248.

EVIDENCE—PREPONDERANCE—ACTION FOR PENALTY.—In an action to recover a statutory penalty, *held,* preponderance of evidence is sufficient to sustain a conviction. *United States* v. *Regan* (1914) 34 Sup. Ct. Rep. 213. See Notes, p. 246.

EVIDENCE—PRESUMPTIONS—ALTERATIONS IN A WILL.—A holographic testament contained several alterations and interlineations not noted before execution but done in the testator's handwriting with the same ink and pen as the rest of the script. There was no extrinsic evidence as to when these changes were made. *Held,* the alterations and interlineations were entitled to probate as part of the will, since it might be inferred from the internal evidence that they were made by the testator before execution. *Matter of Easton* (Surr. Ct. 1914) N. Y. L. J., Jan. 20, 1914.

In the absence of external evidence, an interlineation or erasure apparent on the face of a deed is presumed to have been made before execution. 12 Columbia Law Rev. 558. A contrary view, it is said, would violate the presumption of innocence, since the alteration of a deed after execution amounts to forgery. See *Jordan* v. *Stewart* (1854) 23 Pa. 244. There is no criminality, however, in a testator's amendment of his executed will, and so it is generally held, not only that the rule with regard to deeds does not apply in such cases, but

that unexplained alterations in a will are presumed to have followed execution. *Cooper* v. *Bockett* (1844) 4 Moo. P. C. C. 419; *Wetmore* v. *Carryl* (N. Y. 1882) 5 Redf. 544; 1 Jarman, Wills (6th ed.) 156; Page, Wills § 432. The English cases are probably justified in taking this second step by the provisions of the Wills Act, 1 Vict. c. 26, § 21 (1837), but in America the judges and text-writers have generally followed the English authorities without observing that our statutes make no reference to alterations. See 25 Harvard Law Rev. 699. The better view, established in New York, *Crossman* v. *Crossman* (1884) 95 N. Y. 145; see *Matter of Dake* (N. Y. 1902) 75 App. Div. 403, and Massachusetts, see *Wilton* v. *Humphreys* (1901) 176 Mass. 253, denies the application of any presumption and casts upon the claimant in each case the burden of proving his contention, irrespective of whether it be that the alteration preceded or followed execution. Beal, Cardinal Rules of Interpretation (2nd ed.) 610; see *Scott* v. *Thrall* (1908) 77 Kan. 688. This rule would seem to apply equally to deeds, when no criminal responsibility is actually involved. See 4 Wigmore, Evidence § 2525; 18 Harvard Law Rev. 180; *cf. Jordan* v. *Stewart, supra.*

EVIDENCE—PRIVILEGED COMMUNICATIONS—ATTORNEY AND CLIENT.—One R, a fellow prisoner, had at the dictation of the accused written a letter to an attorney for the purpose of securing his services on the trial. The letter fell into the hands of a public detective. *Held,* R was incompetent to testify as to the contents of the letter, it being a privileged communication. *State* v. *Loponio* (N. J. 1913) 88 Atl. 1045. See Notes, p. 253.

HUSBAND AND WIFE—RIGHT OF WIFE AGAINST THIRD PARTIES—NEGLIGENT INJURY TO HUSBAND.—As a result of the defendant's negligence, the plaintiff's husband was injured. *Held,* the plaintiff may not recover for any ensuing loss of *consortium. Gambino* v. *Manufacturer's Coal & Coke Co.* (Mo. 1913) 158 S. W. 77.

As *consortium* is founded upon the reciprocal duties of the marriage status, see *Nolin* v. *Pearson* (1906) 191 Mass. 283, and is a right to companionship, society and affection, distinct from any right to support or services, see *Kelley* v. *New York etc. R. R.* (1897) 168 Mass. 308; *Feneff* v. *New York Central R. R.* (1909) 203 Mass. 278; 10 Columbia Law Rev. 678, it should be protected at the suit either of the husband or the wife. See *Bolger* v. *Boston etc. Ry.* (1910) 205 Mass. 420. If, therefore, a negligent injury to the husband could be said to be only a remote impairment of a vague personal right of the wife, see *Brown* v. *Kisselman* (1912) 177 Ind. 692, so that she should not be allowed to subject to an additional action a defendant who is already liable to her husband in compensatory damages, *Stout* v. *Kansas City etc. Ry.* (Mo. 1913) 157 S. W. 1019, the latter must also, for the sake of consistency, be denied a like action when the positions are reversed. See *Hawkins* v. *Front Street Ry.* (1892) 3 Wash. 592. Such a result is, however, unnecessary, because this interest in the conjugal relationship, although ill defined and to some extent personal, has been definitely recognized at law, 1 Cooley, Torts, 470 *et seq;* see 26 Harvard Law Rev. 74; 10 Columbia Law Rev. 775, and appropriately protected in equity, see *Ex parte Warfield* (1899) 40 Tex. Cr. 413, so that it would seem to have the character of a valuable property right, see *Foote* v. *Card* (1889) 58 Conn. 1, which, when

actually invaded, should be protected, regardless of the intent of the wrongdoer. *Jones* v. *Utica etc. R. R.* (N. Y. 1886) 40 Hun 349. The principal case is, therefore, not only inconsistent with the doctrine which allows recovery to a husband in similar circumstances, but ignores the very nature and attributes of the right of *consortium.*

JUDGMENTS—PENDENCY OF AN APPEAL—RES ADJUDICATA.—The defendant seeks to set up as *res adjudicata* a judgment against the plaintiff, from which the plaintiff had taken an appeal. *Held,* it was not *res adjudicata* since the appeal was pending. *General Electric Co.* v. *American Copper Co.* (D. C. 1913) 208 Fed. 24.

The appeal was unknown to the early common law, see *Ketchum* v. *Thatcher* (1882) 12 Mo. App. 185, and a review could be accomplished only by means of the writ of error, *Sharon* v. *Hill* (C. C. 1885) 26 Fed. 337, 345, the function of which was to correct errors of law appearing on the record, see *Ball* v. *The Mayor* (1851) 9 Ga. 286, with the effect that the judgment of the lower court was left intact. Consequently in such a case it is properly held that the judgment may be pleaded as *res adjudicata. Reese* v. *Domato* (1902) 44 Fla. 692. The office of the appeal, on the other hand, which was known only to equity and admiralty practice, see *Sharon* v. *Hill, supra; Souter* v. *Baymore* (1847) 7 Pa. 415, was to remove the case to a higher court to be there tried *de novo.* Hence, the appeal operated to deprive the judgment of its force as *res adjudicata, Ketchum* v. *Thatcher, supra,* since theoretically it no longer existed. Under the modern practice, however, the effect of the appeal is generally to suspend execution, but otherwise to leave the judgment undisturbed; see Elliott, Appellate Procedure, § 544; Freeman, Judgments (3rd ed.) § 328; the judgment, therefore, remains effective as *res adjudicata. Creighton* v. *Keith* (1897) 50 Neb. 810; see *Moore* v. *Williams* (1890) 132 Ill. 589; *Munn* v. *Gordon* (1912) 87 Kan. 519. In any given case, however, on principle the effect of the appeal should depend primarily upon the nature of the appellate jurisdiction, that is, whether the higher court has the power to try the case *de novo* or merely to reconsider questions of law involved. Freeman, Judgments (3rd ed.) § 328; see *Bank* v. *Wheeler* (1859) 28 Conn. 433; *Reese* v. *Damato, supra.*

LANDLORD AND TENANT—ADVERSE POSSESSION—DETENTION OF RENT BY LANDLORD'S AGENT.—An agent leased to a third person the land of his undisclosed principal. Subsequently, he notified the principal that he claimed title to the land and thenceforth refused to account for the rents. The statutory period having run after this notice, he claimed title by adverse possession. *Held,* he did not acquire title. *Krishnadixit* v. *Baldixit* (India 1913) 15 Bombay Law Reporter 1016.

It is well settled that a party who lets land in his own name, even though some one else is really the owner, is the tenant's landlord, and his title may be perfected by the continued possession of the tenant. Underhill, Landlord & Tenant, § 573. But where such lessor is agent for an undisclosed principal, the courts are undecided whether to follow this undisputed property rule or to apply the anomalous doctrines of undisclosed principal so as to make the lessee the tenant of the principal. On the one hand, where the lease is under seal the undisclosed principal cannot sue on it, *Schaefer* v. *Henkel* (1878) 75 N. Y. 378; *McColgan* v. *Katz* (1899) 60 N. Y. Supp. 291, and the agent is the true landlord. See *Melcher* v. *Kreiser*

(N. Y. 1898) 28 App. Div. 362. If the lease is not under seal, on the other hand, the principal has an interest in it and is sometimes called the landlord, see *Ivy Courts Realty Co.* v. *Barker* (1911) 128 N. Y. Supp. 715, but he can sue only if he formally adopts the tenant as his, see *Brooks* v. *Cook* (1904) 141 Ala. 499; *Anderson* v. *Connor* (1904) 87 N. Y. Supp. 449, and in regard to the lease the agent is still clothed with proprietary powers. See *Spence* v. *Wilson* (1897) 102 Ga. 762; *Hinckley* v. *Guyon* (1899) 172 Mass. 412. In this country this remains true even though the agent makes the lease "as agent" for an unnamed principal. *Holt* v. *Martin* (1866) 51 Pa. 499. The English courts, however, adopt the better doctrine that where an agent for an unnamed principal does not purport to act in his own right, he is not the landlord. Tiffany, Landlord & Tenant, 470. Where the agent is invested with the owner's rights he is the trustee of an express trust, *Houck* v. *Williams* (1905) 34 Col. 138; *Melcher* v. *Kreiser, supra,* and his mere possession and failure to account for the rents gives him no title under the Statute of Limitations. *Jones* v. *Henderson* (1897) 149 Ind. 458; *Anderson* v. *Fry* (N. Y. 1907) 116 App. Div. 740. Where, however, as in the principal case, the trustee clearly repudiates the trust and with the knowledge of the *cestui* claims to hold the estate as his own, the Statute should take effect. 2 Perry, Trusts (6th ed.) § 864.

LANDLORD AND TENANT—TAXATION—STATE AS LESSOR.—The state leased tide lands to the plaintiff in error for a term of years. The leaseholds were subsequently assessed for local improvements under a statute authorizing the taxation of "all leasehold, contractual or possessory interests in any tide lands owned by the state". *Held,* the assessment was valid. *Trimble* v. *Seattle* (1914) 34 Sup. Ct. Rep. 218.

The expenses of a special assessment are met by the persons to whose benefit the improvements inure, who, in the usual case of landlord and tenant, are the lessors. Since ordinary tide land leases, however, leave the lessor no substantial interest in the land, it would be reasonable to give effect to the exact language of the statute under consideration and consider the assessment as a tax upon the "leasehold interest", which is property and therefore subject to taxation. *Moeller* v. *Gormley* (1906) 44 Wash. 465. Viewing the assessment in the light of a tax on the land, however, as was done by the court in the principal case, if there is in existence a covenant that the lessor shall pay all taxes, any attempt to compel the lessee to bear the burden of the assessment would be invalid, as impairing the obligation of contract. A demise of land by one individual to another, when the lease is silent on the subject, generally gives rise to an implied covenant on the part of the lessor to pay all taxes and assessments levied on the property during the continuation of the term. 1 Tiffany, Landlord and Tenant, 838; 1 McAdam, Landlord and Tenant (4th Ed.) 449; see *People ex rel. International Navigation Co.* v. *Barker* (1897) 153 N. Y. 98, 101. But when the State is lessor, in the absence of an express covenant which clearly manifests the intention of the legislature to exempt the land from taxation, no such covenant will be implied, *Wells* v. *Savannah* (1901) 181 U. S. 531; *St. Louis* v. *United Rys. Co.* (1907) 210 U. S. 266, since such implication would abridge the taxing power, and the relinquishment of this power is never to be presumed. See *Providence Bank* v. *Billings* (1830) 4 Pet. 514, 561.

LIMITATION OF ACTIONS—FOREIGN CORPORATIONS—RIGHT TO PLEAD STATUTE OF LIMITATIONS.—A foreign railroad corporation failed to comply with the statute requiring the filing of articles of incorporation and designation of an agent within the State to receive process. In a suit for personal injuries, *held,* the defendant could not avail itself of the local Statute of Limitations. *Hale* v. *St. Louis & S. F. Ry.* (Okla. 1913) 134 Pac. 949. See Notes, p. 251.

LIMITATION OF ACTIONS—PART PAYMENT—SALE OF COLLATERAL SECURITY.—In an action upon a promissory note more than six years after its maturity, where collections had been made upon the collateral security by the holder of the note within six years prior to the commencement of the action, *held,* two judges dissenting, the plaintiff's crediting the proceeds of the collateral in discharge *pro tanto* of the indebtedness did not constitute a part payment sufficient to toll the Statute of Limitations. *Security Bank of New York* v. *Finkelstein* (N. Y. App. Div. 1913) N. Y. L. J., Jan. 24, 1914.

For a full discussion of the principles applicable to this case, which follows and explains the case of *Brooklyn Bank* v. *Barnaby* (1910) 197 N. Y. 210, see the criticism of the latter in 10 Columbia Law Rev. 271.

LIMITATION OF ACTIONS—POSSESSION UNDER A VOID GUARDIAN'S SALE.—The plaintiff, in a suit to quiet title, went into possession of real estate immediately after acquiring it at a void guardian's sale, and remained in continuous possession for the statutory period. *Held,* the void sale was sufficient to set in motion the Statute of Limitations. *Dodson* v. *Middleton* (Okla. 1913) 135 Pac. 368.

It is axiomatic that a judgment by a court having no jurisdiction is void, 1 Black, Judgments, 218, and consequently that a sale made under such a judgment is a nullity. *Campbell* v. *McCahan* (1866) 41 Ill. 45. Thus, although it may be readily conceived that a statute may effectuate a sale which is invalid merely by reason of the omission of some formality which the legislature could have dispensed with as a prerequisite, *Radcliffe* v. *Scruggs* (1885) 46 Ark. 96, 107; *Nevin* v. *Baily* (1884) 62 Miss. 433, yet it is apparent that any enactment which assumes to validate a decree, void for want of jurisdiction, is unconstitutional under the "due process" clause. *Maguiar* v. *Henry* (1886) 84 Ky. 1; see *Kelly* v. *Herrall* (C. C. 1884) 20 Fed. 364; *cf. In re Christiansen* (1898) 17 Utah 412. In the principal case, therefore, if the real owner had remained in possession, the void sale could not by itself have set the statute in motion. *O'Connor* v. *Carpenter* (1906) 144 Mich. 240; Cooley, Constitutional Limitations (7th ed.) 523; but see *Nind* v. *Myers* (1906) 15 N. Dak. 400. However, when the purchaser at such a sale goes into immediate possession, it is held by the weight of authority, that the true owner's right of action is barred at the end of the statutory period. *Barton* v. *Kimmerly* (1905) 165 Ind. 609; *Pugh* v. *Youngblood* (1881) 69 Ala. 296; but see *Holmes* v. *Loughren* (1906) 97 Minn. 83; *cf. Stegall* v. *Huff* (1881) 54 Tex. 193. Inasmuch as such statutes exist in order to compel an individual, who is not in the present enjoyment of his rights, to enforce his claim within a reasonable period, this view is evidently predicated upon the sound conception of their scope and purpose. Cooley, Constitutional Limitations (7th ed.) 521; *cf. Good* v. *Norley* (1869) 28 Ia. 188. Hence, although the defendant in the principal case had not been

divested of his title by the void sale, nevertheless by his failure to assert his ownership within the period which the legislature considered reasonable, he is deemed to have abandoned that right.

MARRIAGE—COMMON LAW MARRIAGE—PROSECUTION FOR BIGAMY.—A ceremonial marriage of the defendant with O in New York was void. The defendant then moved to Illinois and there, after having cohabited with O for ten years, married S without having obtained a divorce from O. In a prosecution for bigamy, *held,* one judge dissenting, the subsequent cohabitation in Illinois did not constitute a common law marriage and hence could not sustain the conviction. *People* v. *Shaw* (Ill. 1913) 102 N. E. 1031.

A present agreement to assume the marriage relation is sufficient to constitute a common law marriage, Spenser, Domestic Relations, § 88; Tiffany, Persons & Domestic Relations (2nd ed.) 31, and subsequent cohabitation is not essential, 2 Greenleaf, Evidence (16th ed.) § 460; Peck, Domestic Relations, § 3; but see *Tartt* v. *Negus* (1899) 127 Ala. 301. In civil cases a presumption in favor of the existence of the matrimonial relation and its validity arises from cohabitation and repute, Tiffany, Persons & Domestic Relations (2nd ed.) 33; see *Cram* v. *Burnham* (1828) 5 Me. 213, and evidence of this is sufficient to establish a common law marriage. See *Schuchart* v. *Schuchart* (1900) 61 Kan. 597. However, in criminal prosecutions this presumption is negatived by the presumption of innocence of the defendant, 1 Bishop, Marriage, Divorce, and Separation, § 1037; see 4 Chamberlayne, Evidence, § 2977, and the rule prevails that the fact of marriage must be established by direct proof. *People* v. *Humphrey* (N. Y. 1810) 7 Johns. 314; see *Morris* v. *Miller* (1767) 4 Burr. 2057; *Bowman* v. *Little* (1905) 101 Md. 273. When a ceremonial marriage is invalidated by some impediment unknown to either party, cohabitation subsequent to its removal is practically conclusive evidence of a common law marriage because of the continuance of the original intention of the parties to make a valid marriage. Peck, Domestic Relations, § 3. Moreover, the jurisdiction of the principal case has clearly recognized this principle, *Manning* v. *Spurck* (1902) 199 Ill. 447; *Land* v. *Land* (1903) 206 Ill. 288, and since there is no logical reason for not extending it to a criminal prosecution, *cf. State* v. *Cooper* (1890) 103 Mo. 266; *State* v. *Jenkins* (1897) 139 Mo. 535, the decision seems unsupportable.

MUTUAL BENEFIT ASSOCIATIONS—EXPULSION OF SUBORDINATE BRANCH—DISPOSITION OF ASSETS.—The local incorporated branch of a mutual benefit association was expelled by the supreme body, which then brought a bill for possession of the assets in accordance with its by-laws. *Held,* the proceedings had been incorrectly taken and were void, as the assets of a voluntary association could not be forfeited by consent to such laws. *Grand Court F. of A.* v. *Court Cavour #133 F. of A.* (N. J. 1913) 88 Atl. 191.

The rights of members of mutual benefit associations rest upon contract and are determined by the laws of the organization to which the members have assented. Bacon, Benefit Societies and Life Ins. (3rd ed.) § 91. The decisions of the supreme body rendered in strict accordance therewith, in good faith, and with due process are final unless the rules are contrary to public policy. *Cf.* 8 Columbia Law Rev. 503. A by-law that provides for the forfeiture of the property of a branch to the benevolent purposes of the order upon the dissolution of the branch by the acts of its members, is held valid

whether the branch is incorporated, *Gross Loge D. O. H.* v. *Brausch* (1912) 167 Ill. App. 13, or unincorporated. *Knights of Pythias* v. *Germania Lodge* (1897) 56 N. J. Eq. 63. It would seem equally lawful that a by-law impress a similar trust upon the funds of the branch to be effective upon its expulsion by the supreme body for a proper agreed cause; *cf. Oliver* v. *Hopkins* (1887) 144 Mass. 175; but a grant of such power must be strictly construed. *Cf. Wicks* v. *Monihan* (1891) 130 N. Y. 232. However, because of the supremacy of corporate functions imposed by the State, it is held that where the branch is incorporated, the superior body cannot exercise such a power, *Merrill Lodge* v. *Ellsworth* (1889) 78 Cal. 166; *Dist. Grand Lodge* v. *Jedidjah Lodge* (1885) 65 Md. 236, although it would not seem to involve directly a dissolution of the corporate entity of the branch. But see *State Council* v. *Enterprise Council* (1908) 75 N. J. Eq. 245. Where the branch is unincorporated and therefore a mere group of individuals, there is no such problem presented, *Grand Grove* v. *Garibaldi Grove* (1900) 130 Cal. 116, but although similar forfeitures by individual members are upheld, *Anacosta Tribe* v. *Murbach* (1858) 13 Md. 91, the doctrine that the provision is void as against public policy has been approved in New Jersey. *State Council* v. *Hollywood Council* (1908) 75 N. J. Eq. 292; *cf. Austin* v. *Searing* (1857) 16 N. Y. 112; *Wicks* v. *Monihan, supra.*

NEGOTIABLE INSTRUMENTS—NOTE OF A CORPORATION—DUTY OF INDORSEE.—In an action on a promissory note made by a corporation payable to the order of one of its officers, *held,* one justice dissenting, that knowledge that the officer of the corporation who negotiated the instrument was the payee thereof, and endorsed it in a transaction for his personal gain, put the indorsee upon inquiry as to the validity of the note, so that he was not a holder in due course. *Newman* v. *John J. Mitchell Co.* (N. Y. App. Div. 1914) N. Y. L. J., Feb. 13, 1914.

This doctrine, although frequently criticised as in conflict with the law merchant, has been generally accepted. See 13 Columbia Law Rev. 727.

OFFICERS—MANDATORY INJUNCTION—SUBSTITUTION OF SUCCESSORS IN OFFICE.—The plaintiff, who was resisting a state tax upon constitutional grounds, asked also for a mandatory injunction directing the comptroller to refund taxes already paid under protest. Pending an appeal, the defendant died, and his successor was substituted by stipulation and order. *Held,* the order must be vacated. *Pullman Co.* v. *Croom* (Supreme Court, Oct. Term, 1913). Not yet reported.

Although mandamus and mandatory injunction are personal writs, presupposing that an individual is derelict or over-zealous in the performance of ministerial duties, and enforced by contempt proceedings, Mechem, Officers, §§950, 984, state courts generally allow the substitution of successors in office by stipulation or even mere motion, see *Lindsey* v. *Auditor* (Ky. 1867) 3 Bush. 231, 235, either considering the officer merely as the means of reaching the office, without reference to the particular incumbent, *Nance* v. *People* (1898) 25 Colo. 252; *Reeder* v. *Wexford County Treasurer* (1877) 37 Mich. 351, or for practical reasons, in order to curb fraud by wholesale resignations and to mitigate the annoyance of our system of rapid rotation in office. *People* v. *Maher* (N. Y. 1892) 64 Hun 408; *Bushnell* v. *Gates* (1867) 22 Wis. 202; *Hardee* v. *Gibbs* (1874) 50 Miss. 802. With the excep-

tion of the widely quoted *dictum* in *Thompson* v. *United States* (1880) 103 U. S. 480, the federal Supreme Court has refused to allow substitution even by stipulation of the parties, objecting that it presumes wrongdoing by the successor, besides saddling him with all costs, *Warner Valley Stock Co.* v. *Smith* (1897) 165 U. S. 28, 33; *United States* v. *Butterworth* (1898) 169 U. S. 600; see *Carpenter* v. *Kone* (1909) 54 Tex. Civ. App. 264, and criticising the extension to officers of the general rule as to boards and commissions, to which the defense of change of membership is denied only because they are conceived as continuing bodies. *Murphy* v. *Utter* (1902) 186 U. S. 95, 99. Since simple performance of the required act will quash the proceedings, while costs are in the discretion of the court, it would seem no hardship upon the successor, and on the contrary conducive to simplicity and effectiveness, to permit substitution. The doctrine of the Supreme Court has been superseded by statute, 30 U. S. Stat., 822, which, however, applies only to Federal officers; the principal case, therefore, is governed by the earlier decisions of that court.

PLEADING AND PRACTICE—BILL OF PARTICULARS—CONTRIBUTORY NEGLIGENCE.—An order granting the plaintiff's motion for a bill of particulars of the affirmative defense of contributory negligence, *affirmed, Havholm* v. *Whale Creek Iron Works* (N. Y. App. Div., 2nd Dept.); *reversed, Griffin* v. *Cunard S. S. Co.* (N. Y. App. Div., 1st Dept.). 50 N. Y. L. J., Dec. 26, 1913.

The plaintiff, under a general allegation of negligence, is required on the defendant's motion to particularize as to the facts of negligence upon which he seeks to hold the defendant liable, *King* v. *Brookfield* (N. Y. 1902) 72 App. Div. 483; *Waller* v. *Degnon Cont. Co.* (N. Y. 1907) 120 App. Div. 389, and since bills of particulars have been required generally of affirmative defenses, *Dwight* v. *Germania Life Ins. Co.* (1881) 84 N. Y. 493; *Spitz* v. *Heinze* (N. Y. 1902) 77 App. Div. 317, there seems equal reason to require of the defendant particulars of the alleged acts of contributory negligence, which has in New York been made an affirmative defense by Laws of 1910, ch. 352, § 202a in actions under the Labor Law and by § 841b, Code of Civ. Proc. in actions for negligently causing death. It is objected in the first department decision that the defendant will frequently be unable to comply with the order for particulars even though he has interposed the defense of contributory negligence in perfect good faith, since he cannot in negligence actions obtain a general examination before trial. This view is based, however, on a decision which was rendered while it was still part of the plaintiff's affirmative case to prove absence of contributory negligence, *Wood* v. *Hoffman* (N. Y. 1907) 121 App. Div. 636, and it would seem that on the reasoning of that very case the defendant would now be entitled to such an examination if necessary and material to the defense. See *Kornbluth* v. *Isaacs* (N. Y. 1912) 149 App. Div. 108; *Young DeMott* (N. Y. 1847) 1 Barb. 30. It is also objected that the plaintiff must have known what happened and is, therefore, not entitled to particulars, but it is not his knowledge of the facts which is determinative but his ignorance of his opponent's claim. *Dwyer* v. *Slattery* (N. Y. 1907) 118 App. Div. 345; *Higgins* v. *Erie R. R.* (N. Y. 1910) 140 App. Div. 222. It is submitted, therefore, that the preferable view is that of the second department. See *Martin* v. *McTaggart,* Ir. R. [1906] 2. K. B. 120.

SHORE LANDS—CONSTRUCTION OF STATE GRANT—RELICTION.—The State granted shore lands in fee, such lands being described under the state statute as lying between the water line and the line of navigability. The federal government, having been duly authorized by the State prior to the grant, was about to lower the water line and thus move the line of navigability further out. *Held,* the grantee of the shore lands would thereby become the owner of the additional strip between the old and new lines of navigability. *State* v. *Sturtevant* (Wash. 1913) 135 Pac. 1035.

Since a riparian owner on a navigable stream becomes the owner in fee of additions to his land by accretion or reliction, *Steers* v. *City of Brooklyn* (1885) 101 N. Y. 51, 56; see *Hammond* v. *Shepard* (1900) 186 Ill. 235, it would seem, by analogy, that the same rule should apply to submerged land extending to the line of navigability. Much stress, however, has been generally laid upon the requirement that the reliction be "gradual and imperceptible", *Burman* v. *Sunnuchs* (1877) 42 Wis. 233; 2 Bl., Comm. *262, and it is obvious from the artificial character of the process by means of which the water was to be lowered in the principal case, that the recession there would not come within this conception. Consequently the conclusion reached by the court, in awarding the fee of the land between the old and new lines of navigability to the grantee, is incompatible with a strict analogy to the common law property rights of a riparian owner. Nevertheless, it is well established that a riparian owner, not owning the fee under the water, has a right of access to the channel, *Yates* v. *Milwaukee* (1870) 10 Wall. 497; see *Bedlow* v. *N. Y. Floating Dry Dock Co.* (1889) 112 N. Y. 263, 280, and inasmuch as the proprietor of the unusual property in the principal case had evidently acquired the customary rights of a riparian owner with the grant, this doctrine would seem to be applicable. It is apparent, therefore, that a decree refusing to divest the state of its technical fee, and yet recognizing the grantee's right of access across the strip in dispute would have been at the same time logical and salutary. It is to be noted, however, that the question is a unique one and that no precedent can be found either in direct support or in refutation of the position taken in the principal case.

STATUTE OF FRAUDS—CONTRACT TO MAKE MUTUAL WILLS—SPECIFIC PERFORMANCE.—A husband and wife disposed of all their real and personal property by mutual wills, in accordance with an oral contract. By a later will, the husband expressly revoked all former wills. The widow sought specific performance of the contract. *Held,* the contract was unenforcible under the Statute of Frauds. *In Re Edwall's Estate* (Wash. 1913) 134 Pac. 1041.

The rules of law governing ordinary contracts to convey are equally applicable to contracts to devise realty, *Ellis* v. *Cary* (1889) 74 Wis. 176; *Pond* v. *Sheean* (1890) 132 Ill. 312, so that such a contract will be specifically enforced only if the Statute of Frauds has been complied with, for which purpose the will itself may be a sufficient memorandum, 12 Columbia Law Rev. 377, provided that it obeys the general rule that the memorandum must contain all the essential terms of the contract. 3 Columbia Law Rev. 355. Of course, a will is always revocable during the life of its maker, but revocation of the will does not prevent the operation of the instrument as an evidential document to establish the existence of a contract. In the

case of a joint and mutual will, the document itself is sufficient evidence to establish the contract. 14 Columbia Law Rev. 95. Mutual wills, on the contrary, are not intrinsic evidence of a contract, *Edson* v. *Parsons* (1898) 155 N. Y. 555; *Hale* v. *Hale* (1894) 90 Va. 728, and it would seem *a fortiori,* that, unexplained, they are insufficient memoranda to satisfy the Statute of Frauds, which requires the proof to be in writing setting forth the essential terms of the contract without recourse to parol testimony, Browne, Statute of Frauds (4th Ed.) § 371; *Williams* v. *Morris* (1877) 95 U. S. 444, nor should the mere making of the wills constitute such part performance as to render the contract enforcible. *Hale* v. *Hale, supra; Gould* v. *Mansfield* (1869) 103 Mass. 408; *cf. Swash* v. *Sharpstein* (1896) 14 Wash. 426.

TRUSTS—RESULTING TRUSTS—STATUTE OF FRAUDS—PAROL EVIDENCE.—A widow sued to enforce her statutory rights in her husband's estate. The defendant offered parol evidence to prove that although the husband took by warranty deed, the parties intended that the land should be impressed with a trust in favor of the original grantor. *Held,* the evidence should have been received. *Flesner* v. *Cooper* (Okla. 1913) 134 Pac. 379.

Under modern conveyances, which uniformly recite consideration, no presumption arises, as formerly, that a resulting trust in favor of the grantor is intended whenever land is conveyed without consideration in fact. 3 Pomeroy, Equity Jurisprudence (3rd ed.) § 1035. And parol evidence is generally inadmissible to prove an intention to create such a trust. 1 Perry, Trusts (6th ed.) § 162; *Lovett* v. *Taylor* (1896) 54 N. J. Eq. 311. In fact, by the express provisions of the Statute of Frauds, equity is powerless to compel the grantee to carry out a parol trust. *Patton* v. *Beecher* (1878) 62 Ala. 579; *Willis* v. *Robertson* (1903) 121 Ia. 380. But if the Statute renders the trust unenforcible, it is inequitable for the grantee to hold the land free from his obligation, and just as if the conveyance had been induced by fraud, mistake or misrepresentation, he should be compelled to reconvey the property. 20 Harvard Law Rev. 549; 6 Columbia Law Rev. 326. In Massachusetts this doctrine of restitution is recognized only so far as to compel the grantee to pay the value of the land. See *Cromwell* v. *Norton* (1906) 193 Mass. 291. But equity enforces restitution *in specie* wherever it is practicable, so the land and not merely its value should be restored. Other States, however, refuse the right to recover either the land or its value. See *Wolford* v. *Farnham* (1890) 44 Minn. 159; *Marvel* v. *Marvel* (1903) 70 Neb. 498; *Sturtevant* v. *Sturtevant* (1859) 20 N. Y. 39. These decisions, by an erroneous application of the Statute of Frauds, permit the grantee by repudiating his undertaking to enrich himself at the grantor's expense. But in restitution no specific performance is decreed; the parties are merely placed in *statu quo,* and the Statute of Frauds is entirely inapplicable. As the principal case suggests, under such a parol trust neither the grantee nor his widow can hold the land free from these equitable rights of the grantor.